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INTERNATIONAL LIABILITY FOR INJURIOUS CONSEQUENCES OF ACTS NOT PROHIBITED BY INTERNATIONAL LAW

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TEXT OF DRAFT ARTICLES 1, 2 (PARAGRAPHS A, B AND C), 11 TO 14 BIS [20 BIS], 15 TO 16 BIS AND 17 TO 20 WITH COMMENTARIES THERETO PROVISIONALLY ADOPTED BY THE COMMISSION AT ITS FORTY-SIXTH SESSION

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GE.94-63197 (E)

Article 16 bis

Information to the public

States shall, whenever possible and by such means as are appropriate, provide their own public likely to be affected by an activity referred to in article 1 with information relating to that activity, the risk involved and the harm which might result and ascertain their views.

Commentary

(1) Article 16 bis requires the States, whenever possible and by such means as are appropriate, to provide their own publics with information relating to the risk and harm that might result from an activity subject to authorization and to ascertain their views thereon. The article therefore requires the States (a) to provide information to their publics regarding the activity and the risk and the harm it involves, and (b) to ascertain the views of the public. It is, of course, clear that the purpose of providing information to the public is in order to allow its members to inform themselves and then to ascertain their views. Without that second step, the purpose of the article would be defeated.

(2) The content of the information to be provided to the public includes information about the activity itself as well as the nature and the scope of risk and harm that it entails. Such information is contained in the documents accompanying the notification which is effected in accordance with article 15 or in the assessment which may be carried out by the State likely to be affected under article 19.

(3) This article is inspired by new trends in international law, in general, and environmental law, in particular of seeking to involve in the decision-making processes, individuals whose lives, health, property and environment might be affected by providing them with a chance to present their views and be heard by those responsible for making the ultimate decisions.

(4) Principle 10 of the Rio Declaration on Environment and Development provides for public involvement in decision-making processes as follows:

> Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity

to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided. 77/

(5) A number of other recent international legal agreements dealing with environmental issues have required States to provide the public with information and to give it an opportunity to participate in decision-making processes. Article VII, paragraphs 1 and 2 of the Code of Conduct on Accidental Pollution of Transboundary Inland Waters is relevant in that context:

1. In order to promote informed decision-making by central, regional or local authorities in proceedings concerning accidental pollution of transboundary inland waters, countries should facilitate participation of the public likely to be affected in hearings and preliminary inquiries and the making of objections in respect of proposed decisions, as well as recourse to and standing in administrative and judicial proceedings.

2. Countries of incident should take all appropriate measures to provide physical and legal persons exposed to a significant risk of accidental pollution of transboundary inland waters with sufficient information to enable them to exercise the rights accorded to them by national law in accordance with the objectives of this Code. 78/

Article 16 of the Convention on the Protection and Use of Transboundary Watercourses and International Lakes; 79/ Article 3, paragraph 8 of the Convention on Environmental Impact Assessment in a Transboundary Context; 80/ Article 17 of the Convention on the Protection of the Marine Environment of the

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77/ Doc. A/CONF.155/26/Rev.1 (vol. I), p. 3.

78/ Economic Commission for Europe, Code of Conduct on Accidental Pollution of Transboundary Inland Waters, Doc. E/ECE/1225 - ECE/ENVWA/16.

79/ International Legal Materials, vol. 31, p. 1313.

80/ E/ECE/1250, reproduced in International Legal Materials, vol. 30, p. 800.

Baltic Sea Area 81/ and Article 6 of the United Nations Framework Convention on Climate Change 82/ all provide for information to the public.

(6) There are many modalities for participation in decision-making processes. Reviewing data and information on the basis of which decisions will be based and having an opportunity to confirm or challenge the accuracy of the facts, the analysis and the policy considerations either through administrative tribunals, courts, or groups of concerned citizens is one way of participation in decision-making. In the view of the Commission, this form of public involvement only enhances the efforts to prevent transboundary and environmental harm.

(7) The obligation contained in article 16 bis is circumscribed by the phrase "whenever possible and by such means as are appropriate". The words "whenever possible" are assigned here a normative rather than factual reference are intended to take into account possible constitutional and other domestic limitations where such right to hearings, may not exist. The words "by such means as are appropriate" is intended to leave the ways which such information could be provided to the States, their domestic law requirements and the State policy as to, for example, whether such information should be provided through media, non-governmental organizations, public agencies, local authorities, etc.

(8) Article 16 bis limits the obligation of each State to providing such information to its own public. The words "States shall, ..., give to their own public" does not obligate a State to provide information to the public of another State. For example, the State that might be affected, after receiving notification and information from the State of origin, shall, when possible and by such means as are appropriate, inform those parts of its own public likely to be affected before responding to the notification.

Article 17

National security and industrial secrets

Data and information vital to the national security of the State of origin or to the protection of industrial secrets may be withheld, but the

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81/ UNCLOS (05)/B8, No. 22, pp. 54-87.

82/ International Legal Materials, vol. 31, p. 851.

State of origin shall cooperate in good faith with the other States concerned in providing as much information as can be provided under the circumstances.

Commentary

(1) Article 17 is intended to create a narrow exception to the obligation of States to provide information in accordance with articles 15, 16 and 16 bis. In the view of the Commission, States should not be obligated to disclose information that is vital to their national security or is considered an industrial secret. This type of clause is not unusual in treaties which require exchange of information. Article 31 of the draft articles on the law of the Non-Navigational Uses of International Watercourses 83/ also provides for a similar exception to the requirement of disclosure of information.

(2) Article 17 includes industrial secrets in addition to national security. In the context of these articles, it is highly probable that some of the activities which come within the scope of article 1 might involve the use of sophisticated technology involving certain types of information which are protected even under the domestic law. Normally, domestic laws of States determine the information that is considered an industrial secret and provide protection for them. This type of safeguard clause is not unusual in legal instruments dealing with exchange of information relating to industrial activities. For example, Article 8 of the Convention on the Protection and Use of Transboundary Watercourses and International Lakes 84/ and Article 2, paragraph 8 of the Convention on Environmental Impact Assessment in a Transboundary Context 85/ provide for similar protection of industrial and commercial secrecy.

(3) Article 17 recognizes the need for balance between the legitimate interests of the State of origin and the States that are likely to be affected. It, therefore, requires the State of origin that is withholding information on the grounds of security or industrial secrecy, to cooperate in good faith with the other States in providing as much information as can be provided under the

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83/ See Chapter ..., page ... above.

84/ International Legal Materials, vol. 31, p. 1313

85/ Ibid, vol. 30, p. 800.

circumstances. The words "as much information as can be provided" include for example, the general description of the risk and the type and the extent of harm to which a State may be exposed. The words "under the circumstances" refer to the conditions invoked for withholding the information. Article 17 relies on the good faith cooperation of the parties.

Article 18

Consultations on preventive measures

1. The States concerned shall enter into consultations, at the request of any of them and without delay, with a view to achieving acceptable solutions regarding measures to be adopted in order to prevent or minimize the risk of causing significant transboundary harm, and cooperate in the implementation of these measures.

2. States shall seek solutions based on an equitable balance of interests in the light of article 20.

3. If the consultations referred to in paragraph 1 fail to produce an agreed solution the State of origin shall nevertheless take into account the interests of States likely to be affected and may proceed with the activity at its own risk, without prejudice to the right of any State withholding its agreement to pursue such rights as it may have under these articles or otherwise.

Commentary

(1) Article 18 requires the States concerned, these are the State of origin and the States that are likely to be affected, to enter into consultations in order to agree on the measures to prevent or minimize the risk of causing significant transboundary harm. Depending upon the time at which article 18 is invoked, consultations may be prior to authorization and commencement of an activity or during its performance.

(2) The Commission has attempted to maintain a balance between two equally important considerations in this article. First, the article deals with activities that are not prohibited by international law and that, normally, are important to the economic development of the State of origin. But second, it would be unfair to other States to allow those activities to be conducted without consulting them and taking adequate preventive measures. Therefore, the article provides neither a mere formality which the State of origin has to go through

with no real intention of reaching a solution acceptable to the other States, nor does it provide a right of veto for the States that are likely to be affected. To maintain a balance, the article relies on the manner in which, and purpose for which, the parties enter into consultations. The parties must enter into consultations in good faith and must take into account each other's legitimate interests. The parties consult each other with a view to arriving at an acceptable solution regarding the measures to be adopted to prevent or minimize the risk of significant transboundary harm.

(3) It is the view of the Commission that the principle of good faith is an integral part of any requirement of consultations and negotiations. The obligation to consult and negotiate genuinely and in good faith was recognized in the Lake Lanoux award where the Tribunal stated that:

> Consultations and negotiations between the two States must be genuine, must comply with the rules of good faith and must not be mere formalities. The rules of reason and good faith are applicable to procedural rights and duties relative to the sharing of the use of international rivers; 86/

(4) With regard to this particular point about good faith, the Commission also relies on the judgement of the International Court of Justice in the Fisheries Jurisdiction (United Kingdom v. Iceland) case. There the Court stated that: "[t]he task [of the parties] will be to conduct their negotiations on the basis that each must in good faith pay reasonable regard to the legal rights of the other". 87/ The Commission also finds the decision of the Court in the North Sea Continental Shelf cases (Federal Republic of Germany v. Denmark and Federal Republic of Germany v. Netherlands) 88/ on the manner in which negotiations should be conducted relevant to this article. In those cases the Court ruled as follows:

86/ International Law Reports, 1957 (London, 1961), vol. 24, p. 119.

87/ Fisheries Jurisdiction (United Kingdom v. Iceland) case, Merits, Judgment of 25 July 1974, I.C.J. Reports 1974, para. 78.

88/ North Sea Continental Shelf cases (Federal Republic of Germany v. Denmark, and Federal Republic of Germany v. Netherlands), Judgment of 20 February 1969, I.C.J. Reports 1969, especially p. 47, paras. 85 and 87.

> (a) the parties are under an obligation to enter into negotiations with a view to arriving at an agreement, and not merely to go through a formal process of negotiation as a sort of prior condition for the automatic application of a certain method of delimitation in the absence of agreement; they are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it; 89/

Even though the Court in this judgement speaks of "negotiations", the Commission believes that the good faith requirement in the conduct of the parties during the course of consultation or negotiations are the same.

(5) Under paragraph 1, the States concerned shall enter to consultations at the request of any of them. That is either the State of origin or any of the States likely to be affected. The parties shall enter into consultations without delay. The expression without delay is intended to avoid those situations where a State, upon being requested to enter into consultations, would make unreasonable excuses to delay consultations.

(6) The purpose of consultations is for the parties: (a) to find acceptable solutions regarding measures to be adopted in order to prevent or minimize the risk of significant transboundary harm; and (b) to cooperate in the implementation of those measures. The words "acceptable solutions", regarding the adoption of preventive measures, refers to those measures that are accepted by the parties within the guidelines specified in paragraph 2. Generally, the consent of the parties on measures of prevention will be expressed by means of some form of an agreement.

(7) The parties should obviously aim, first, at selecting those measures which may avoid any risk of causing significant transboundary harm or, if that is not possible, which minimize the risk of such harm. Once those measures are selected, the parties are required, under the last sentence of paragraph 1, to cooperate in their implementation. This requirement, again, stems from the view of the Commission that the obligation of due diligence, the core base of the provisions intended to prevent or minimize significant transboundary harm, is of

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89/ Ibid., para. 85.

a continuous nature affecting every stage related to the conduct of the activity.

(8) Article 18 may be invoked whenever there is a question about the need to take preventive measures. Such questions obviously may arise as a result of article 15, because a notification to other States has been made by the State of origin that an activity it intends to undertake may pose a risk of causing significant transboundary harm; or in the course of the exchange of information under article 16 or in the context of article 19 on the rights of the State likely to be affected.

(9) Article 18 has a broad scope of application. It is to apply to all issues related to preventive measures. For example, when parties notify under article 15 or exchange information under article 16 and there are ambiguities in those communications, a request for consultations may be made simply in order to clarify those ambiguities.

(10) Paragraph 2 provides guidance for States when consulting each other on preventive measures. The parties shall seek solutions based on an equitable balance of interests in light of article 20 (Factors involved in a balance of interests). Neither paragraph 2 of this article nor article 20 precludes the parties from taking account of other factors which they perceive as relevant in achieving an equitable balance of interests.

(11) Paragraph 3 deals with the possibility that, despite all efforts by the parties, they cannot reach an agreement on acceptable preventive measures. As explained in paragraph (3) above, the article maintains a balance between the two considerations, one of which is to deny the States likely to be affected a right of veto. In this context, the Commission recalls the Lake Lanoux award where the Tribunal noted that in certain situations, the party that was likely to be affected, might, in violation of good faith, paralyse genuine negotiation efforts. 90/ To take account of this possibility, the article provides that the State of origin is permitted to go ahead with the activity, for the absence of such an alternative would, in effect, create a right of veto for the States likely to be affected. The State of origin, while permitted to go ahead with the activity, is still obligated to take into account the interests of the States

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90/ International Law Reports, 1957, see note ... above, p. 128.

likely to be affected. As a result of consultations, the State of origin is aware of the concerns of the States likely to be affected and is in even a better position to seriously take them into account in carrying out the activity. In addition, the State of origin conducts the activity "at its own risk". This expression is also used in article 13 on "Pre-existing activities". The explanations given in paragraph (4) of the commentary of article 13 on this expression also apply here.

(12) The last part of paragraph 3 also protects the interests of States likely to be affected, by allowing them to pursue any rights that they might have under these articles or otherwise. The word "otherwise" is intended to have a broad scope so as to include such rights as the States likely to be affected have under any rule of international law, general principles of law, domestic law, etc.

Article 19

Rights of the State likely to be affected

1. When no notification has been given of an activity conducted in the territory or otherwise under the jurisdiction or control of a State, any other State which has serious reason to believe that the activity has created a risk of causing it significant harm may require consultations under article 18.

2. The State requiring consultations shall provide technical assessment setting forth the reasons for such belief. If the activity is found to be one of those referred to in article 1, the State requiring consultations may claim an equitable share of the cost of the assessment from the State of origin.

Commentary

(1) This article addresses the situation in which a State though it has received no notification about an activity in accordance with article 15, becomes aware that an activity is being carried out in another State, either by the State itself or by a private entity and believes that the activity carries a risk of causing it significant harm.

(2) This article is intended to protect the rights and the legitimate interests of States that have reason to believe that they are likely to be adversely affected by an activity. Article 19 enables them to request consultations and imposes a coordinate obligation on the State of origin to accede to the request.

In the absence of article 19, the States likely to be affected cannot compel the State of origin to enter into consultations. Similar provisions have been provided for in other legal instruments. Article 18 of the draft articles on the Law of the Non-Navigational Uses of International Watercourses, 91/ and Article 3, paragraph 7 of the Convention on Environmental Impact Assessment in a Transboundary Context 92/ also contemplate a procedure by which a State likely to be affected by an activity can initiate consultations with the State of origin.

(3) Paragraph 1 allows a State which has serious reason to believe that the activity being conducted in the territory, or otherwise under the jurisdiction or control of another State, has created a risk of causing it significant harm to require consultations under article 18. The words serious reason in the third line of paragraph 1 are intended to preclude other States from creating unnecessary difficulties for the State of origin by requesting consultations on mere suspicion or conjecture. Of course, the State claiming that it has been exposed to a significant risk of transboundary harm will have a far stronger case when it can show that it has already suffered injury as the result of the activity.

(4) Once consultations have begun, the States concerned will either agree that the activity is one of those covered by article 1, and the State of origin should therefore take preventive measures; or the parties will not agree and the State of origin will continue to believe that the activity is not within the scope of article 1. In the former case, the parties must conduct their consultations in accordance with article 18 and find acceptable solutions based on an equitable balance of interests. In the latter case, namely where the parties disagree on the very nature of the activity, no further step is anticipated in the paragraph. The Commission will revert to this issue once it has discussed the question of ways and means of settlement of disputes.

(5) This paragraph does not apply to situations in which the State of origin is still at the planning stage of the activity, for it is assumed that the State of

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91/ See Chapter ..., page ... above.

92/ International Legal Materials, vol. 30, p. 800.

origin may still notify the States likely to be affected. However, if such notification is not effected, the States likely to be affected may require consultations as soon as the activity begins. Consultation may also be requested at the very early stages of the activity such as, for example, the stage of construction.

(6) Paragraph 2, in its first sentence attempts to strike a fair balance between the interests of the State of origin that has been required to enter into consultations and the interests of the State which believes it has been affected or that it is likely to be affected by requiring the latter State to provide justification for such a belief and support it with documents containing its own technical assessment of the alleged risk. The State requesting consultations must as mentioned above, have a "serious reason" for believing that there is a risk and it is likely to suffer harm from it. Taking into account that that State has not received any information from the State of origin regarding the activity and therefore may not have access to all the relevant technical data, the supporting documents and the assessment required of it need not be complete, but should be sufficient to provide a reasonable ground for its assertions. The expression "serious reason" should be interpreted in that context.

(7) The last sentence of paragraph 2 deals with financial consequences, if it is proved that the activity in question is within the scope of article 1. In such cases, the State of origin may be requested to pay an equitable share of the cost of the technical assessment. It is the view of the Commission that such a sharing of the assessment cost is reasonable for the following reasons: 1) the State of origin would have had, in any case, to make such an assessment in accordance with article 12; 2) it would be unfair to expect that the cost of the assessment should be borne by the State that is likely to be injured by an activity in another State and from which it receives no benefit; and 3) if the State of origin is not obliged to share the cost of assessment undertaken by the State likely to be affected, that might serve to encourage the State of origin not to make the impact assessment it should itself have made in accordance with article 12, thereby externalizing the costs by leaving the assessment to be carried out by those States likely to be affected.

(8) The Commission, however, also envisages situations in which the reasons for the absence of notification by the State of origin might be completely innocent. The State of origin might have honestly believed that the activity posed no risk of causing significant transboundary harm. For that reason the State of origin "may be requested to pay an equitable share of the cost of the assessment". These words mean that if, following discussion, it appears that the assessment does not manifest a risk of significant harm, the matter is at an end and obviously the question of sharing the cost does not even arise. But if such a risk is revealed, then it is reasonable that the State of origin should be required to contribute an equitable share of the cost of the assessment. This may not be the whole cost for, in any event, the State likely to be affected would have undertaken some assessment of its own. The share of the State of origin would be restricted to that part of the cost which resulted directly from that State's failure to effect a notification in accordance with article 15 and to provide technical information.

Article 20

Factors involved in an equitable balance of interests

In order to achieve an equitable balance of interests as referred to in paragraph 2 of article 18, the States concerned shall take into account all relevant factors and circumstances, including:

(a) the degree of risk of significant transboundary harm and the availability of means of preventing or minimizing such risk or of repairing the harm;

(b) the importance of the activity, taking into account its overall advantages of a social, economic and technical character for the State of origin in relation to the potential harm for the States likely to be affected;

(c) the risk of significant harm to the environment and the availability of means of preventing or minimizing such risk or restoring the environment;

(d) the economic viability of the activity in relation to the costs of prevention demanded by the States likely to be affected and to the possibility of carrying out the activity elsewhere or by other means or replacing it with an alternative activity;

(e) the degree to which the States likely to be affected are prepared to contribute to the costs of prevention;

(f) the standards of protection which the States likely to be affected apply to the same or comparable activities and the standards applied in comparable regional or international practice.

Commentary

(1) The purpose of this article is to provide some guidance for States who are engaged in consultations seeking to achieve an equitable balance of interests. In reaching an equitable balance of interests, one has to establish facts and to weigh all the relevant factors and circumstances.

(2) The main clause of the article provides that in order "to achieve an equitable balance of interests as referred to in paragraph 2 of article 18, the States concerned shall take into account all relevant factors and circumstances". The article proceeds to set forth a non-exhaustive list of such factors and circumstances. The wide diversity of types of activities which is covered by these articles, and the different situations and circumstances in which they will be conducted, make it impossible to compile an exhaustive list of factors relevant to all individual cases. Some of the factors may be relevant in a particular case, while others may not, and still other factors not contained in the list may prove relevant. No priority or weight is assigned to the factors and circumstances listed, since some of them may be more important in certain cases while others may deserve to be accorded greater weight in other cases. In general the factors and circumstances indicated will allow the parties to compare the costs and benefits which may be involved in a particular case.

(3) Paragraph (a) compares the degree of risk of significant transboundary harm to the availability of means of preventing or minimizing such risk and the possibility of repairing the harm. For example, the degree of risk of harm may be high, but there may be measures that can prevent or reduce that risk, or there may be possibilities for repairing the harm. The comparisons here are both quantitative and qualitative.

(4) Paragraph (b) compares the importance of the activity in terms of its social, economic and technical advantages for the State of origin and the potential harm to the States likely to be affected. The Commission, in this

context recalls the decision in the Donauversinkung case where the court stated that:

> The interests of the States in question must be weighed in an equitable manner one against another. One must consider not only the absolute injury caused to the neighbouring State, but also the relation of the advantage gained by the one to the injury caused to the other. 93/

(5) Paragraph (c) compares, in the same fashion as paragraph (a), the risk of harm to the environment and the availability of means of preventing or minimizing such a risk and the possibility of restoring the environment. The Commission believes that protection of the environment is a very important factor and should be mentioned. The Commission considers Principle 15 of the Rio Declaration relevant to this paragraph where it states: "[w]here there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation." 94/

(6) The Commission is aware that the concept of transboundary harm as used in paragraph (a) might be broadly interpreted and could include harm to the environment. But the Commission makes a distinction, for the purpose of this article, between harm to some part of the environment which could be translated into value deprivation to individuals, and be measurable by standard economic means, on the one hand, and harm to the environment not susceptible to such measurement, on the other. The former is intended to be covered by paragraph (a) and the latter to be covered by this paragraph.

(7) Paragraph (d) introduces a number of factors that must be compared and taken into account. The economic viability of the activity must be compared to the costs of prevention demanded by the States likely to be affected. The cost of the preventive measures should not be so high as to make the activity

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93/ Wurttemberg and Prussia v. Baden (Donauversinkung case) (1927) in Entscheidungen des Reichsgerichts Zivilsachen (Berlin, de Govyter) vol. 116 Appendix, pp. 18-45 (1927), in Annual Digest of Public International Law Cases, (1927-1928) (London, 1931), p. 131; see also Kansas v. Colorado (1907) 206 US 100, and Washington v. Oregon (1936) 297 US 517.

94/ A/CONF.151/26/Rev.1 (vol.I), p. 3.

economically non-viable. The economic viability of the activity should also be assessed in terms of the possibility of changing the location, or conducting it by other means, or replacing it with an alternative activity. The words "conducting [the activity] by other means" intends to take into account, for example, a situation in which one type of chemical substance used in the activity, which might be the source of transboundary harm, could be replaced by another chemical substance; or mechanical equipment in the plant or the factory could be replaced by different equipment. The words "replacing [the activity] with alternative activity" is intended to take account of the possibility that the same or comparable results may be reached by another activity with no risk, or much lower risk, of significant transboundary harm.

(8) Paragraph (e) provides that one of the elements determining the choice of preventive measures is the willingness of the States likely to be affected to contribute to the cost of prevention. For example, if the States likely to be affected are prepared to contribute to the expense of preventive measures, it may be reasonable taking into account other factors, to expect the State of origin to take more costly but more effective preventive measures.

(9) Paragraph (f) compares the standard of prevention demanded of the State of origin to that applied to the same or comparable activity in the State likely to be affected. The rationale is that, in general, it might be unreasonable to demand the State of origin to comply with a much higher standard of prevention than would be operative in the States likely to be affected. This factor, however, is not in itself conclusive. There may be situations in which the State of origin would be expected to apply standards of prevention to the activity that are higher than those applied in the States likely to be affected, i.e., where the State of origin is a highly developed State and applies domestically established environmental law regulations. These regulations may be substantially higher than those applied in a State of origin which may be underdeveloped and may have (and, indeed, have need of) few if any regulations on the standards of prevention. Taking into account other factors, the State of origin may have to apply its own standards of prevention which are higher than those of the States likely to be affected.

(10) The States should also take into account the standards of prevention applied to the same or comparable activities in other regions or, if there are such, the international standards of prevention applicable for similar activities. This is particularly relevant when, for example, the States concerned do not have any standard of prevention for such activities, or they wish to improve their existing standards.